



DEPARTMENT OF ENERGY  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 157

[Docket No. RM20-15-001; Order No. 871-B]

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Order addressing arguments raised on rehearing and clarification, and setting aside, in part, prior order.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) addresses requests for rehearing and clarification on Order No. 871. In Order No. 871, the Commission issued a final rule to amend its regulations to preclude the issuance of authorizations to proceed with construction activities with respect to natural gas facilities approved pursuant to section 3 or section 7 of the Natural Gas Act (NGA) until either the time for filing a request for rehearing of such order has passed with no rehearing request being filed or the Commission has acted on the merits of any rehearing request. This order revises the rule to provide that it will apply only when a request for rehearing raises issues reflecting opposition to project construction, operation, or need. Further, this order revises the rule to provide that the limit on construction authorization will only apply until the earlier of the date that a qualifying rehearing request is no longer pending before the Commission or 90 days following the date that a qualifying request for rehearing may be deemed denied by operation of law. In addition, the Commission announces a general policy with respect to stays of NGA section 7(c) certificate orders, subject to a particularized application of the policy on a case-by-case basis, of its intent to stay its NGA section 7(c) certificate orders during the 30-day rehearing period and pending

Commission resolution of any timely requests for rehearing filed by landowners, subject to the same 90-day time limitation referenced above and certain exceptions. This policy is not intended to prevent a project developer from continuing to engage in development related activities, as permitted consistent with the stay of the certificate, that do not require use of landowner property or that are voluntarily agreed to by the landowner during the stay period.

**DATES:** This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

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**SUPPLEMENTARY INFORMATION:**

## TABLE OF CONTENTS

### Paragraph Numbers

I. Background.....	3.
II. Discussion .....	11.
A. Scope and Application of Order No. 871 .....	11.
B. APA and NGA Requirements.....	31.
C. Commission Policy on Exercise of Eminent Domain Pending Rehearing.....	43.
III. Regulatory Requirements.....	52.
A. Information Collection Statement .....	52.
B. Environmental Analysis.....	53.
C. Regulatory Flexibility Act .....	54.
D. Document Availability .....	55.
E. Effective Date .....	58.

1. On June 9, 2020, the Federal Energy Regulatory Commission (Commission) issued in Order No. 871 a final rule that precludes the issuance of authorizations to proceed with construction activities with respect to a Natural Gas Act (NGA) section 3<sup>1</sup> authorization or section 7(c)<sup>2</sup> certificate order until the Commission acts on the merits of any timely-filed request for rehearing or until the deadline for filing a timely request for rehearing has passed with no such request being filed.<sup>3</sup> On July 9, 2020, the Interstate Natural Gas Association of America (INGAA) requested clarification or, in the alternative, rehearing, and Kinder Morgan, Inc. Natural Gas Entities<sup>4</sup> (Kinder Morgan) and TC Energy Corporation (TC Energy) requested rehearing. On January 26, 2021, the Commission issued Order No. 871-A, which offered interested parties an opportunity to provide further briefing on the issues raised in INGAA's, Kinder Morgan's, and TC Energy's requests for rehearing, and set February 16, 2021, and March 3, 2021, as the initial brief and reply brief deadlines, respectively.<sup>5</sup>

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<sup>1</sup> 15 U.S.C. 717b.

<sup>2</sup> 15 U.S.C. 717f(c).

<sup>3</sup> *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 FR 40113 (July 6, 2020), 171 FERC ¶ 61,201 (2020) (Order No. 871 or final rule).

<sup>4</sup> The Kinder Morgan Gas Entities include: Natural Gas Pipeline Company of America LLC; Tennessee Gas Pipeline Company, L.L.C.; Southern Natural Gas Company, L.L.C.; Colorado Interstate Gas Company, L.L.C.; Wyoming Interstate Company, L.L.C.; El Paso Natural Gas Company, L.L.C.; Mojave Pipeline Company, L.L.C.; Bear Creek Storage Company, L.L.C.; Cheyenne Plains Gas Pipeline Company, LLC; Elba Express Company, L.L.C.; Kinder Morgan Louisiana Pipeline LLC; Southern LNG Company, L.L.C.; and TransColorado Gas Transmission Company LLC.

<sup>5</sup> *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-A, 86 FR 7643 (Feb. 1, 2021), 174 FERC ¶ 61,050 (2021) (Order No. 871-A).

2. Pursuant to *Allegheny Defense Project v. FERC*,<sup>6</sup> the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the NGA,<sup>7</sup> we are modifying the discussion in Order No. 871 and granting, in part, INGAA's request for clarification, setting aside and revising Order No. 871 to resolve, in part, INGAA's, Kinder Morgan's, and TC Energy's requests for rehearing, and otherwise continuing to reach the same result as Order No. 871. As discussed further below, the Commission also adopts a policy of presumptively staying its NGA section 7(c) certificate orders during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners, subject to a time limitation and certain exceptions.<sup>8</sup>

### **I. Background**

3. In Order No. 871, the Commission explained that historically, due to the complex nature of the matters raised on rehearing of orders granting authorizations under NGA sections 3 and 7, the Commission had often issued an order (known as a tolling order) by the thirtieth day following the filing of a rehearing request, allowing itself additional time to provide thoughtful, well-considered attention to the issues raised on rehearing.

4. In order to balance its commitment to expeditiously responding to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the

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<sup>6</sup> 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

<sup>7</sup> 15 U.S.C. 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

<sup>8</sup> See discussion *infra* Part II.C.

possibility of construction proceeding prior to the completion of agency review, the Commission, in Order No. 871, exercised its discretion by amending its regulations to add new § 157.23, which precludes the issuance of authorizations to proceed with construction of projects authorized under NGA sections 3 and 7 during the period for filing requests for rehearing of the initial orders or while rehearing is pending.<sup>9</sup>

5. Three weeks after the Commission issued Order No. 871, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an *en banc* decision in *Allegheny*.<sup>10</sup> The court held that the Commission's use of tolling orders solely to allow itself additional time to consider an application for rehearing does not preclude operation of the NGA's deemed denial provision,<sup>11</sup> which enables a rehearing applicant to seek judicial review after thirty days of agency inaction.<sup>12</sup> The court explained that, to prevent a rehearing from being deemed denied, the Commission must act on an application for rehearing within thirty days of its filing by taking one of the four NGA-enumerated actions: grant rehearing, deny rehearing, or abrogate or modify its order without further hearing.<sup>13</sup>

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<sup>9</sup> Order No. 871 also revised § 153.4 of the Commission's regulations to incorporate a cross-reference to new § 157.23.

<sup>10</sup> 964 F.3d 1.

<sup>11</sup> 15 U.S.C. 717r(a).

<sup>12</sup> *Allegheny*, 964 F.3d at 18-19.

<sup>13</sup> *See id.* at 13 (quoting 15 U.S.C. 717r(a)).

6. On July 9, 2020, INGAA filed a request for clarification or, in the alternative, rehearing of Order No. 871.<sup>14</sup> On the same day, Kinder Morgan and TC Energy also filed requests for rehearing.<sup>15</sup>

7. To facilitate our reconsideration of Order No. 871 and to ensure a complete record for further action, on January 26, 2021, the Commission issued an order providing interested parties an opportunity to comment on the arguments raised in the requests for rehearing.<sup>16</sup> In particular, the Commission sought comment on five central questions: (a) whether the final rule's application should be limited to certain issues or arguments raised on rehearing; (b) whether the final rule should apply to all orders pertaining to an NGA section 3 authorization or section 7 certificate or only a subset thereof; (c) how the final rule should apply following the *Allegheny* decision; (d) whether the Commission should modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing is pending; and (e) whether the Commission should set a specific time limit after which an authorization to commence construction could issue.<sup>17</sup>

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<sup>14</sup> INGAA's July 9, 2020 Motion to Intervene and Request for Clarification or, in the Alternative, Rehearing (INGAA Rehearing). INGAA's Rehearing included a motion to intervene in Docket No. RM20-15-000. Intervention is not necessary in order to request rehearing of a rulemaking. *See, e.g., Generic Determination of Rate of Return on Common Equity for Elec. Utilities*, Order No. 389-A, 29 FERC ¶ 61,223, at 61,459 n.2 (1984) ("Rhode Island also requested leave to intervene out of time. Intervention is not necessary in order to request rehearing of a rulemaking."). Accordingly, INGAA's motion is unnecessary.

<sup>15</sup> Kinder Morgan's July 9, 2020 Request for Rehearing (Kinder Morgan Rehearing); TC Energy's July 9, 2020 Request for Rehearing (TC Energy Rehearing).

<sup>16</sup> Order No. 871-A, 174 FERC ¶ 61,050. Several briefs filed in response to Order No. 871-A contained motions to intervene or were later supplemented by separately-filed motions to intervene. As we noted above, intervention in a rulemaking proceeding is not required. *See supra* note 14.

<sup>17</sup> For the full text of the questions posed by the Commission, *see* Order No. 871-

8. In response, the Commission received twelve initial briefs and five reply briefs. Seven initial briefs and three reply briefs came from various entities representing the natural gas industry, which generally oppose what is in their view the overly broad scope of the final rule, including: the three rehearing applicants (INGAA, Kinder Morgan, TC Energy);<sup>18</sup> BHE Pipeline Group, LLC (BHE Pipeline);<sup>19</sup> the Enbridge Gas Pipelines (Enbridge);<sup>20</sup> the Gas and Oil Association of West Virginia, Inc. (Gas & Oil WV);<sup>21</sup> and the Tallgrass Pipelines (Tallgrass).<sup>22</sup>

9. We received five initial briefs and two reply briefs supporting and, in some cases, seeking expansion of, the final rule from: Maryland, Massachusetts, New Jersey, Oregon, Rhode Island, and the District of Columbia (States);<sup>23</sup> a consortium of public interest organizations (Public Interest Organizations);<sup>24</sup> the Delaware Riverkeeper

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A, 174 FERC ¶ 61,050 at P 7.

<sup>18</sup> See INGAA's February 16, 2021 Initial Brief (INGAA Initial Brief) and March 3, 2021 Reply Brief (INGAA Reply Brief); Kinder Morgan's February 16, 2021 Initial Brief (Kinder Morgan Initial Brief) and March 3, 2021 Reply Brief (Kinder Morgan Reply Brief); TC Energy's February 16, 2021 Comments (TC Energy Initial Brief).

<sup>19</sup> See BHE Pipeline's February 16, 2021 Comments (BHE Pipeline Initial Brief).

<sup>20</sup> See Enbridge's February 16, 2021 Initial Brief (Enbridge Initial Brief) and March 3, 2021 Reply Brief (Enbridge Reply Brief).

<sup>21</sup> See Gas & Oil WV's February 16, 2021 Initial Brief (Gas & Oil WV Initial Brief).

<sup>22</sup> See Tallgrass's February 16, 2021 Comments (Tallgrass Initial Brief).

<sup>23</sup> See States' February 16, 2021 Brief (States Initial Brief).

<sup>24</sup> See Public Interest Organizations' February 16, 2021 Brief (Public Interest Organizations Initial Brief) and March 3, 2021 Reply Brief (Public Interest Organizations Reply Brief). The Public Interest Organizations include: Alliance for the Shenandoah Valley; Appalachian Mountain Advocates; Appalachian Voices; Chesapeake Bay Foundation, Inc.; Cowpasture River Preservation Association; Earthjustice; Friends of Buckingham; Friends of Nelson; Highlanders for Responsible Development; Natural Resources Defense Council; Piedmont Environmental Council; Sierra Club; Sound



Network and Maya Van Rossum (Delaware Riverkeeper);<sup>25</sup> the Niskanen Center and various landowners (Niskanen Center);<sup>26</sup> and three individual landowners.<sup>27</sup>

10. The Commission appreciates the additional briefing provided by the filers, as well as the diversity of perspectives represented. Taking those comments under consideration, the Commission addresses the issues raised on rehearing below.<sup>28</sup>

## **II. Discussion**

### **A. Scope and Application of Order No. 871**

11. INGAA seeks clarity regarding the scope and application of Order No. 871.

Similarly, TC Energy seeks rehearing regarding the scope of Order No. 871. INGAA and TC Energy describe a number of circumstances that they contend would not implicate the concerns expressed by the Commission in promulgating Order No. 871 and ask the Commission to clarify Order No. 871 or revise it to provide that the rule does not apply in these circumstances. INGAA also asks the Commission to clarify how Order No. 871 will operate in light of certain rehearing procedures discussed in *Allegheny*.

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Rivers, Inc.; Sustainable FERC Project; Virginia Wilderness Committee; Wild Virginia; and Winyah Rivers Alliance.

<sup>25</sup> See Delaware Riverkeeper's February 16, 2021 Brief (Delaware Riverkeeper Initial Brief).

<sup>26</sup> See Niskanen Center's February 16, 2021 Brief (Niskanen Center Initial Brief) and March 3, 2021 Reply Brief (Niskanen Center Reply Brief).

<sup>27</sup> See Deborah Evans, Ron Schaaf, and Bill Glow's February 16, 2021 Comments (Landowners Initial Brief).

<sup>28</sup> Some briefs raised issues outside the scope of the rule, such as the Commission's issuance of conditional certificates pursuant to NGA section 7 and the appropriate definition of pre-construction activities. The Commission will not address those issues here. We note, however, that the Commission recently solicited comments on, among other things, its use of conditional certificates. See *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125, at PP 13-15 (2021).

# **1. Rehearing Requests that do not Oppose the Project**

12. INGAA asks the Commission to clarify that the rule precluding issuance of construction authorizations under NGA sections 3 and 7 would not apply in situations where only the project developer, a shipper, or other party supporting construction of the project files a request for rehearing on non-construction related grounds, such as rate or tariff issues.<sup>29</sup> In other words, INGAA seeks clarification that the rule would not apply where no affected landowner or other party that opposes the project seeks rehearing. Similarly, TC Energy seeks “limited rehearing with respect to the breadth of the new regulation,” and asserts that the Commission failed to engage in reasoned decision making by adopting an overly-broad regulation that would prevent an applicant from engaging in construction while a rehearing request is pending, even where the request does not challenge whether or how the project should be constructed.<sup>30</sup>

13. In addition, INGAA asks the Commission to clarify that the rule will not apply to any request for rehearing that only raises issues “related to a tariff, rate, terms or conditions of service, policy, or other matters *that do not impact affected landowners.*”<sup>31</sup> INGAA suggests, in the alternative, that the Commission add clarifying language in § 157.23 specifying that the rule will apply only when rehearing is sought by an “affected

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<sup>29</sup> INGAA Rehearing at 13-16.

<sup>30</sup> TC Energy Rehearing at 4-6. TC Energy also asks the Commission to clarify that, “as a general matter, it intends to continue its policy of being ‘less lenient in the grant of late interventions’ in pipeline certificate proceedings, *Tenn. Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,167, at P 50 (2018), as well as its ‘general policy to deny late intervention at the rehearing stage.’” *Id.* (citing *Tenn. Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190, at P 4 (2018)). The Commission’s late intervention policy is not relevant to Order No. 871. Therefore, we decline to take up TC Energy’s invitation.

<sup>31</sup> INGAA Rehearing at 17 (emphasis added).

landowner” as that term is defined in the Commission’s regulations.<sup>32</sup> This revision, INGAA explains, would ensure that the rule would not apply to projects where no affected landowners seek rehearing or to projects that do not involve the use of eminent domain authority.<sup>33</sup> INGAA also urges the Commission to revise the rule to clarify that it does not apply to natural gas export or import facilities authorized under section 3 of the NGA because such authorizations do not confer eminent domain authority.<sup>34</sup>

14. As described below, we grant, in part, INGAA’s request for clarification, setting aside and revising Order No. 871 to resolve, in part, INGAA’s, Kinder Morgan’s, and TC Energy’s requests for rehearing and otherwise continue to reach the same result as Order No. 871. The Commission does not intend Order No. 871 to apply in instances where construction of the project is unopposed. Accordingly, we are revising the rule to clarify that the prohibition on issuing authorizations to proceed with construction during the rehearing period will not apply in proceedings where no party files a request for rehearing raising issues reflecting opposition to project construction, operation, or need.<sup>35</sup> For

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<sup>32</sup> 18 CFR 157.6(d)(2).

<sup>33</sup> INGAA Rehearing at 17. INGAA provides the following examples of NGA section 7 projects that would not involve the use of eminent domain authority: projects involving construction on property owned or controlled by the pipeline, such as a compressor station project; modifications of existing facilities where construction would occur within the existing right-of-way; and projects where all easements have already been mutually agreed and secured. *Id.*

<sup>34</sup> *Id.* at 17-18.

<sup>35</sup> *See infra* P 30. Several commenters agree that the rule should be narrowed to not apply to rehearing requests filed by the project developer itself or another party that supports project construction (e.g., a shipper). *See, e.g.,* Enbridge Initial Brief at 10-11; Gas & Oil WV Initial Brief at 6; Niskanen Center Initial Brief at 12; Tallgrass Initial Brief at 13; TC Energy Initial Brief at 5-10; Enbridge Reply Brief at 7-10. Conversely, a few commenters argue that the rule should be retained without modification and that it should apply to all requests for rehearing regardless of the issues raised or the identity of the rehearing applicant, citing concerns about administering a rule with exceptions. *See,*

example, requests for rehearing that only raise issues related to a tariff, rate, or terms or conditions of service would not trigger the rule's prohibition on construction authorizations. Contrary to some commenters' concerns about tailoring the scope of the rule to allow certain exceptions, the Commission is confident in its ability to administer the rule as revised.<sup>36</sup>

15. However, we disagree with INGAA's suggestion that the Commission limit the rule's application to only those requests for rehearing filed by affected landowners, as that term is defined in our regulations.<sup>37</sup> Adopting INGAA's suggestion would exclude from the rule's purview rehearing requests raising environmental matters or general opposition to a project, as well as rehearing requests filed by members of communities

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*e.g.*, Public Interest Organizations Initial Brief at 10 (“a rule without carve-outs is cleaner, clearer, and easier to administer”); Landowners Initial Brief at 2; Delaware Riverkeeper Initial Brief at 6-8; States Initial Brief at 4 n.8 (“The Commission should not attempt to guess at the importance of certain issues and arguments, but instead withhold authorizations to commence construction during the pendency of all rehearing requests.”).

<sup>36</sup> We note that the Commission's administration of the rule is facilitated by the statutory and regulatory requirements that issues be raised on rehearing with specificity. *See* 15 U.S.C. 717r(a); *see also* 18 CFR 385.713(c)(2) (requiring that requests for rehearing include a “separate section entitled ‘Statement of Issues,’ listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying”).

<sup>37</sup> 18 CFR 157.6(d)(2). Some commenters on behalf of the natural gas industry agreed with INGAA's request to limit the rule's application to only rehearing requests filed by or implicating affected landowners. *See, e.g.*, BHE Pipeline Initial Brief at 9-10; Enbridge Initial Brief at 6, 10; Enbridge Reply Brief at 7-9. *But see* Gas & Oil WV Initial Brief at 5 (rule, if retained, should be limited to rehearing requests raising “clear threats of true irreparable harm to landowners *or environmental justice communities directly in the path of a project.*”) (emphasis added); BHE Pipeline Initial Brief at 5 (rule “should be revised to apply only in limited circumstances requiring further review of matters raised by affected landowners *or parties who will be directly impacted by immediate construction.*”).

that would be impacted by the construction of new natural gas facilities.<sup>38</sup> That was not our intent. In issuing Order No. 871, preventing potential impacts on affected landowners during the pendency of the rehearing period was a primary concern, but it was not the Commission's sole concern. We think it appropriate to refrain from permitting construction to proceed until the Commission has acted upon any request for rehearing that opposes project construction and operation or raises issues regarding project need, regardless of the basis or whether rehearing is sought by an affected landowner.<sup>39</sup> INGAA fails to explain why these concerns are any less important in section 3 cases, where the project authorization does not confer eminent domain authority.<sup>40</sup> We deny this aspect of INGAA's request for clarification and continue to

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<sup>38</sup> The Commission has long recognized that communities surrounding a pipeline right-of-way have interests that may be adversely affected by approval of certificate projects. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748, *corrected*, 89 FERC ¶ 61,040(1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

<sup>39</sup> Governmental, environmental, and community interests are also impacted by projects approved under NGA sections 3 and 7, and the possibility of construction proceeding prior to the completion of agency review. *See States Initial Brief* at 2-6 (explaining that states, local governments, and tribes “may oppose projects on grounds such as the public need for a project, a project’s contribution to climate change, harm to the environment from the construction and operation of pipeline projects, noise and traffic impacts, effects on historical resources, and other concerns”); *Public Interest Organizations Initial Brief* at 8 (deeming it illogical to limit the rule’s application to only landowner rehearing requests because “the construction of a Commission-approved gas project, and the permanent changes to the environment and cultural resources that are caused by such construction, are cognizable injuries.”).

<sup>40</sup> That an authorization under NGA section 3 does not confer eminent domain authority does not negate the existence of affected landowners who may oppose nearby construction of export or import facilities. An affected landowner, as defined in our regulations, and a landowner whose land is at risk of being acquired through eminent domain are not mutually exclusive. For example, an affected landowner can be one whose property “[i]s within one-half mile of proposed . . . LNG facilities.” 18 CFR 157.6(d)(2)(iii).

find that the intent of the Order No. 871 was to ensure that construction of an approved natural gas project will not commence until the Commission has acted upon the merits of a request for rehearing, “*regardless of land ownership.*”<sup>41</sup>

## **2. Rehearing Requests of Non-Initial and Amendment Orders**

16. INGAA asks the Commission to clarify that construction could be allowed to proceed, even where a rehearing request has been filed, where rehearing is sought not of an initial order authorizing construction but of a subsequent order that merely implements the original authorization—such as orders relating to compliance with environmental conditions, requests for variances, notices to proceed with construction, or authorizations to place constructed facilities into service.<sup>42</sup> This clarification, INGAA states, would prevent unnecessary delays or interruptions in project construction that could occur if project opponents request rehearing of subsequent orders that merely implement the terms and conditions of the initial order. For similar reasons, INGAA also seeks clarity that a bar on the commencement of construction arising from the filing of a rehearing request regarding an order amending the terms of an existing authorization would apply only to facilities approved in the amendment order, not to the facilities approved in the original order.

17. To the extent that a non-initial order merely implements the terms, conditions, or other provisions of an initial authorizing order—such as a delegated order issuing a notice to proceed with construction, approving a variance request, or allowing the applicant to place the project, or a portion thereof, in service—a request for rehearing of

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<sup>41</sup> Order No. 871, 171 FERC ¶ 61,201 at P 11 (emphasis added).

<sup>42</sup> INGAA Rehearing at 19.

that order would not implicate the initial authorizing order and so we agree that the rule would not apply.<sup>43</sup>

18. We also agree with INGAA that, with respect to amendments, § 157.23's prohibition on the issuance of construction authorizations prior to Commission action on rehearing would apply only to the facilities approved by the amendment order for which rehearing is sought. It would not relate back to any facilities previously approved by the Commission in the initial authorizing order that remain unchanged by the amendment order.

### **3. Post-*Allegheny* Rehearing Treatment**

19. INGAA poses several circumstances that may unfold following *Allegheny* and asks the Commission to elaborate on whether and how the rule promulgated in Order No. 871 would apply in those cases. It asks the Commission to clarify that the rule would not apply once a rehearing request has been deemed denied by operation of law due to Commission inaction on the request for thirty days.<sup>44</sup>

20. As further explained below, we revise the rule to provide that the limit on construction authorization will apply until the earlier of the date that (1) a qualifying rehearing request is no longer pending before the Commission or (2) 90 days following

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<sup>43</sup> A challenge to a non-initial order is appropriately confined in scope to the specific agency action being challenged and may not revisit findings of the initial order itself. *See, e.g., Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005) (finding route alternative claim raised during initial certification process barred on res judicata grounds in subsequent review of pipeline's compliance with certificate conditions).

<sup>44</sup> INGAA Rehearing at 21-24. Notably, no commenters appear to argue that authorizations to proceed with construction should be allowed during the 30-day rehearing period following a Commission order issuing or amending a section 7 certificate or section 3 authorization.

the date that a qualifying request for rehearing may be deemed denied. This revision reflects that, as permitted by NGA section 19(a), rehearing may be deemed denied by operation of law in the absence of Commission action on the merits by the 30th day following receipt of a rehearing request. Order No. 871's use of the phrase "until the Commission has acted upon the merits of that request," assumed, incorrectly, that such action was statutorily required. The revision clarifies that the limitation on construction will apply so long as the rehearing remains pending or until 90 days following the date that a request for rehearing may be deemed denied. We next describe four scenarios following the filing of a rehearing request in the post-*Allegheny* landscape to further explain when a rehearing remains pending.

21. First, the Commission could issue an order addressing the merits of the rehearing request before the thirtieth day following the date the request is filed. Pursuant to Order No. 871, because the Commission had acted on the merits of the rehearing request, and rehearing was no longer pending, authorization to proceed with construction could be issued so long as the certificate or authorization holder had also met the necessary conditions of the order associated with commencement of construction.

22. Second, the Commission might not act on the merits within thirty days following the filing of a rehearing request. Under NGA section 19(a), such inaction by the Commission would mean that the request for rehearing may be deemed denied by operation of law. In such situations, the Commission might issue a notice indicating that rehearing may be deemed denied by operation of law. If this notice does not state that the Commission intends to take further action on the rehearing request, then rehearing is no longer pending before the Commission, and construction could be allowed to proceed.



23. Third, the Commission might not act on a rehearing request within thirty days but might issue a notice indicating that rehearing may be deemed denied and also that the Commission intends to address the merits of the rehearing request in a future order, as provided in section 19(a) of the NGA.<sup>45</sup> In such a case, rehearing is still pending before the Commission, and Order No. 871 would apply. Specifically, under Order No. 871 as issued, construction could not be allowed to proceed until the Commission issues its further order or otherwise indicates that the rehearing is no longer pending before the Commission by notice, order, or filing the record with the court of appeals (which affords the court exclusive jurisdiction to affirm, modify, or set aside the Commission's order(s)).<sup>46</sup>

24. The States, the Public Interest Organizations, and the Niskanen Center generally support the application of the rule's restriction on construction in this manner.<sup>47</sup>

Delaware Riverkeeper urges us to take this a step further, arguing that the Commission should withhold construction authorization until the deadline for judicial review passes or until the reviewing court resolves the issues raised on appeal.<sup>48</sup> Conversely, INGAA and most natural gas industry commenters argue that construction authorizations should be

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<sup>45</sup> 15 U.S.C. 717r(a).

<sup>46</sup> *See id.* 717r(b) (stating that upon the filing of a petition for judicial review, the court of appeals "shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.") and *id.* 717r(c) (The commencement of judicial review proceedings "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.").

<sup>47</sup> *See* Public Interest Organizations Initial Brief at 12-13, 15; States Initial Brief at 11; Niskanen Center Initial Brief at 14; *see also* Public Interest Organizations Reply Brief at 2-4.

<sup>48</sup> *See* Delaware Riverkeeper Initial Brief at 10-12.

permitted once a rehearing request is deemed denied by operation of law, regardless of whether the Commission signals its intent to issue a subsequent order addressing the arguments raised on rehearing. They assert that authorization to proceed with construction should be allowed following a deemed denial because at that point any party aggrieved by a Commission order would be free to seek judicial review and, if necessary, request injunctive relief from the court.<sup>49</sup> Alternatively, INGAA and TC Energy suggest that construction authorizations should be allowed 30 days after a rehearing request is deemed denied (i.e., roughly 60 days after filing the rehearing request).<sup>50</sup> According to INGAA and TC Energy, this approach would provide the Commission time to issue an order addressing the merits of the rehearing request, aggrieved parties time to file a petition for review and, if necessary, seek a judicial stay before any construction, and pipeline developers and customers with certainty regarding construction timelines.<sup>51</sup>

25. We clarify that construction may be permitted to proceed once the Commission issues its further order or the reviewing court otherwise obtains exclusive jurisdiction at the time the record is filed with it, as this signifies the completion of agency review. While the court may exercise “judicial superintendence”<sup>52</sup> once rehearing is deemed denied, the Commission retains jurisdiction to “modify or set aside, in whole or in part” the certificate order for which rehearing has been sought until the record on review is

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<sup>49</sup> See, e.g., INGAA Initial Brief at 12; Enbridge Initial Brief at 14-16; BHE Pipeline Initial Brief at 11; Gas & Oil WV Initial Brief at 7; Tallgrass Initial Brief at 10-12; see also INGAA Reply Brief at 8-11; Enbridge Reply Brief at 14-17, 20-22.

<sup>50</sup> See INGAA Initial Brief at 28-30; TC Energy Initial Brief at 11.

<sup>51</sup> See INGAA Initial Brief at 28-30; TC Energy Initial Brief at 11-12.

<sup>52</sup> *Allegheny*, 964 F.3d at 17.

filed with the court of appeals. Accordingly, while parties may seek injunctive relief from the court at that stage, as the Commission explained in Order No. 871, the purpose of the rule is to preclude construction during the period the Commission may act on rehearing.<sup>53</sup> As a result, we find that it is appropriate to generally refrain from issuing an authorization to proceed with construction until the Commission has completed its decisionmaking process.

26. However, upon consideration of the comments filed in response to Order No. 871-A, we believe it is appropriate to provide a date certain by which the prohibition on issuing an authorization to proceed with construction would terminate. In particular, we modify our prior order to provide that the rule's restriction on issuing construction authorizations will expire 90 days following the date that a request for rehearing may be deemed to have been denied if the request is still pending before the Commission. We believe that this strikes an appropriate balance that allows aggrieved parties time to access the courts while providing project developers with a predictable time period after which construction authorizations may be permitted in the event a rehearing request remains pending before the Commission.

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<sup>53</sup> If the Commission, in acting on rehearing of a section 3 or section 7(c) authorization order, changes the outcome of the underlying authorization order, such that further rehearing lies, the Commission would continue to apply Order No. 871 to preclude construction if a qualifying rehearing request is filed. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015). However, if the Commission issues a substantive order on rehearing that does not change the outcome of the underlying authorization order, subsequent requests for rehearing or clarification of the previously issued rehearing order will not re-trigger the provisions of Order No. 871 to further preclude the issuance of an authorization to proceed with construction. In those rare instances in which the Commission later determines that further procedural steps are necessary in a given case (*see, e.g., Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (order establishing briefing)), the 90-day period following the date that a qualifying request for rehearing may be deemed denied by operation of law would not be altered or extended.

27. Fourth, as described by the *Allegheny* court, the Commission could “grant rehearing for the express purpose of revisiting and substantively reconsidering a prior decision,” where it “needed additional time to allow for supplemental briefing or further hearing processes.”<sup>54</sup> Under those circumstances, *i.e.*, where the Commission grants rehearing without issuing a final order, the original authorization would no longer be in effect and the provisions of Order No. 871 would no longer apply since there would be no final order pursuant to which a notice to proceed could be issued.

28. INGAA urges the Commission to set a deadline, not to exceed 60 days from any order granting rehearing for further procedures, to issue a final order on the merits of the rehearing request.<sup>55</sup> Because timelines associated with supplemental briefing or evidentiary submissions may vary based on the complexity of the issues warranting further procedures, we decline to do so and intend to continue to act on requests for rehearing as soon as possible.

29. Finally, INGAA also asks that we revise § 157.23 to expressly state that the Commission may waive the applicability of the rule for “good cause shown.”<sup>56</sup> The

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<sup>54</sup> 964 F.3d at 16.

<sup>55</sup> INGAA Rehearing Request at 4-5, 24-26 (providing a “predictable and transparent timetable would help project developers, their customers, and end-users of gas plan for construction timetables and avoid unnecessary costs and disruption”); *see also* INGAA Initial Brief at 10, 28. Some commenters advanced similar requests, and generally noted that setting a specific timeframe for action on requests for rehearing and/or requests for authorization to commence construction would be beneficial as it would provide regulatory certainty and transparency.

<sup>56</sup> INGAA Rehearing at 5, 25-26, and 34. This request was reiterated in some of the briefs filed by natural gas companies. *See, e.g.*, Enbridge Initial Brief at 11-12; Enbridge Reply Brief at 10.

Commission has broad authority to waive application of its own regulations and does not find it necessary to revise the rule to incorporate a “good cause” exception.

30. Consistent with the foregoing discussion, we revise 18 CFR 157.23 to read as follows:

With respect to orders issued pursuant to 15 U.S.C. 717b or 15 U.S.C.

717f(c) authorizing the construction of new natural gas transportation, export, or import facilities, no authorization to proceed with construction activities will be issued:

(a) until the time for the filing of a request for rehearing under 15 U.S.C.

717r(a) has expired with no such request being filed, or

(b) if a timely request for rehearing *raising issues reflecting opposition to project construction, operation, or need* is filed, until: *(i) the request is no longer pending before the Commission, (ii) the record of the proceeding is filed with the court of appeals, or (iii) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 15 U.S.C. 717r(a).*<sup>57</sup>

## **B. APA and NGA Requirements**

### **1. APA Notice and Comment Requirement**

31. Section 553 of the Administrative Procedure Act (APA) generally requires federal agencies to publish in the *Federal Register* a notice of proposed rulemaking and to provide interested persons an opportunity to submit written comments on the proposed

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<sup>57</sup> The italicized text reflects the revisions to § 157.23 that we are adopting herein.

rule prior to issuing a final rule.<sup>58</sup> However, these requirements, commonly referred to as the APA's notice and comment procedures, do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."<sup>59</sup>

32. Kinder Morgan and INGAA, (the latter in the alternative to its request for clarification), argue that, by issuing a final rule without providing the public notice and opportunity to comment, the Commission violated section 553 of the APA.<sup>60</sup>

Specifically, Kinder Morgan argues that the Commission erred by relying on the APA's exception to notice-and-comment rulemaking for "rules of agency organization, procedure, or practice" to promulgate the rule because, it contends, the rule substantially affects the rights and interests of project proponents and their customers.<sup>61</sup> INGAA advances a similar argument, stating that the changes adopted in Order No. 871 are not "technical matters of procedure," but rather entail "substantive alterations of substantial rights subject to the APA's notice-and-comment procedures."<sup>62</sup>

33. Even if the rule appears procedural on its face, Kinder Morgan and INGAA argue, the rule's substantive effect on the natural gas pipeline industry is significant and "sufficiently grave so that notice and comment are needed to safeguard the policies

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<sup>58</sup> 5 U.S.C. 553.

<sup>59</sup> *Id.* 553(b)(3)(A).

<sup>60</sup> Kinder Morgan Rehearing at 6-12; INGAA Rehearing at 27-32.

<sup>61</sup> Kinder Morgan Rehearing at 8.

<sup>62</sup> INGAA Rehearing at 28.

underlying the APA.”<sup>63</sup> In so positing, INGAA and Kinder Morgan note that of the 1,000 certificates of public convenience and necessity issued by the Commission since 1999, parties sought rehearing in 240 cases (approximately 24 percent).<sup>64</sup>

34. Kinder Morgan and INGAA also contend that the Commission failed to consider the rule’s impact on the natural gas pipeline industry’s business models, which developed in reliance on the Commission’s prior practice of authorizing construction prior to acting on applications for rehearing.<sup>65</sup> INGAA stresses that the “timing of approvals, construction initiation, and placement of projects into natural gas service are among a pipeline company’s most important practical and commercial considerations.”<sup>66</sup> Kinder Morgan and INGAA argue that the Commission failed “to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”<sup>67</sup>

## **2. Order No. 871 was properly issued as a final rule.**

35. Because the rule neither substantially “alters the rights or interests” of regulated natural gas companies nor changes the agency’s substantive outcomes, the APA’s notice

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<sup>63</sup> See Kinder Morgan Rehearing at 11-12 (quoting *Mendoza v. Perez*, 754 F.3d 1002, 1023 (D.C. Cir. 2014) (citations omitted)); INGAA Rehearing at 30-31 (same).

<sup>64</sup> Kinder Morgan Rehearing at 12; INGAA Rehearing at 31.

<sup>65</sup> Kinder Morgan Rehearing at 10 (citing *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913-1915 (2020) (in rescinding the Deferred Action for Childhood Arrivals program, the Department of Homeland Security should have assessed whether there were reliance interests, determined the significance of any such interests, and weighed those interests against competing policy concerns)); INGAA Rehearing at 32-34 (same).

<sup>66</sup> INGAA Rehearing at 33.

<sup>67</sup> Kinder Morgan Rehearing at 10 (quoting *Regents of the Univ. of Cal.*, 140 S. Ct. at 1915); INGAA Rehearing at 34 (same).

and comment procedures were not required.<sup>68</sup> Nothing in Order No. 871, as revised here, changes the standards the Commission applies, or the ultimate result, on rehearing of NGA section 7 certificate orders. Moreover, the timing of when to permit construction to begin is a matter entirely within the Commission's existing discretion and not a matter of right. Nothing in the NGA or the Commission's regulations, prior to Order No. 871, addresses the timing of authorizations to commence construction. And nothing in the NGA or the Commission's regulations prevents the Commission from acting on rehearing prior to issuing an authorization to proceed with construction. Staff, or the Commission itself, could validly have established the same policy, either generally or on a case-by-case adjudicatory basis, without any announcement at all. Given the absence of a right to obtain authorization to proceed with construction at any particular time, Kinder Morgan and INGAA have not demonstrated that Order No. 871 is anything more than a procedural rule. In addition, an otherwise procedural rule, such as this, "does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties."<sup>69</sup>

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<sup>68</sup> See *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)); *id.* at 1048. "In determining whether a rule is substantive, we must look at its effect on those interests ultimately at stake in the agency proceeding." *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637 (D.C. Cir. 1984) (holding that a decision to freeze applications for television licenses on some frequencies affected an applicant's interest "only incidentally" and was therefore procedural) (citing *Pickus v. U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (holding that parole board guidelines were substantive because they "were the kind calculated to have a substantial effect on the ultimate parole decisions"))).

<sup>69</sup> *James V. Hurson Assocs., Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("Appellant has cited no case in which this Court has required notice-and-comment rulemaking for an especially burdensome procedural rule. Nor could it . . .").



36. Neither Kinder Morgan nor INGAA sets forth with any specificity the significant and “sufficiently grave” impacts they contend will befall the natural gas pipeline industry as a result of Order No. 871. They merely note that of the over 1,000 certificates of public convenience and necessity issued since 1999, parties sought rehearing 24 percent of the time. But both entities fail to mention that the timing of an initial Commission decision on a project proposed under NGA sections 7 or 3 has always been undefined. While a project proponent may identify in its application a requested approval and/or in-service date, these dates are requests that do not control the timing of the Commission’s decision. Rather, the Commission’s timeline for processing project applications is dictated by factors such as the complexity of proposed projects, the quality of information provided by the applicant and the applicant’s timeliness in responding to staff information requests, changes made by the applicant to its proposal, and the nature of the issues in each case. Neither the public nor the project proponent is privy to the date on which the Commission may act on a project application filed under NGA section 3 or 7. This means that, even prior to Order No. 871, project development timelines had to account for some uncertainty in when the Commission might issue its decision on an NGA section 7 or 3 application and, if appropriate, subsequently authorize commencement of construction. Any incremental delay or uncertainty created by Order No. 871 is acceptable given the benefits that the rule provides.

37. Further, in many, if not most, instances, construction cannot begin immediately upon issuance of an initial order under NGA sections 3 or 7. Typically, construction of natural gas facilities cannot commence without the certificate or authorization holder first filing documentation demonstrating either that it has received all applicable authorizations required under federal law or that such authorizations have been waived.

Often this involves finalizing the pipeline route, completing Endangered Species Act or National Historic Preservation Act consultation, and/or obtaining state certifications under the Clean Water Act or the Coastal Zone Management Act. Based on data maintained by Commission staff for the five calendar years preceding Order No. 871 (i.e., 2015-2019), an average of 85 days elapsed between issuance of an initial order and issuance of an authorization to proceed with construction. Put another way, prior to Order No. 871, on average, natural gas companies should not have expected to receive authorization to proceed with construction sooner than three months after order issuance.

38. For the reasons discussed above, there has been no showing that Order No. 871 will substantially impact the natural gas industry. Similarly, Kinder Morgan and INGAA have not established that the natural gas industry had a legitimate reliance interest in prior instances where Commission staff issued authorizations to proceed with construction while requests for rehearing were pending. Though the natural gas industry may have relied on past Commission practice, any such reliance does not establish a legal right to Commission action on a particular timetable, especially where the relevant Commission process was not established by regulation, policy statement, or spelled out in any detail in case law.

39. In any event, even assuming the Commission was required to solicit comments on the new rule, the Commission has fully satisfied this requirement by soliciting further briefing on rehearing in this proceeding, including the opportunity for both initial and reply briefs.<sup>70</sup> Moreover, in light of the Commission's announced goal of acting on

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<sup>70</sup> In this regard, we note that the industry commenters have not identified an instance of delay resulting from application of Order No. 871.

landowners' rehearing requests within 30 days,<sup>71</sup> the significantly increased speed with which the Commission resolves rehearing requests following the recent *Allegheny* decision, and the tailoring of the rule to apply only where a rehearing request reflects opposition to a project, we do not anticipate that the rule will impose any significant burden on the natural gas industry.

### **3. NGA Section 19(c) Stay Provision**

40. Section 19(c) of the NGA states, in relevant part, that “[t]he filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”<sup>72</sup> Kinder Morgan asserts that the Commission violated section 19(c) by broadly staying construction pending rehearing without a specific finding that a stay is warranted.<sup>73</sup> Order No. 871, Kinder Morgan contends, issued a “blanket stay of construction of all projects authorized under [NGA] Sections 3 and 7, pending rehearing, regardless of whether any party requests or demonstrates a stay is required.”<sup>74</sup> This outcome, Kinder Morgan claims, is inconsistent with case law that explains Congress intended to allow construction to proceed while an application for rehearing is pending.<sup>75</sup>

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<sup>71</sup> In January 2020, the Commission formally reorganized the rehearings group within the Office of General Counsel, adding a landowner group that gives first priority to landowner rehearing requests of NGA section 7 certificate orders, with the aim of resolving such requests within 30 days.

<sup>72</sup> 15 U.S.C. 717r(c).

<sup>73</sup> Kinder Morgan Rehearing at 13-15.

<sup>74</sup> *Id.* at 14.

<sup>75</sup> Kinder Morgan Rehearing at 15 (citing *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) (*Berkley*), *cert. denied sub nom. Berkley v. FERC*, 139 S. Ct. 941 (2019)).

41. The case law Kinder Morgan offers to support its claim that Order No. 871 is inconsistent with Congress’s intent when enacting NGA section 19(c) is unavailing. In affirming the district court’s dismissal for lack of subject matter jurisdiction of a complaint challenging the constitutionality of various NGA provisions in *Berkley*<sup>76</sup>, the U.S. Court of Appeals for the Fourth Circuit stated that “Congress contemplated construction would be allowed to continue while FERC reviews a petition for rehearing.” This statement without more does nothing to counter the fact that it is entirely within the Commission’s discretion to decide whether, when, and how to allow construction of projects authorized under NGA sections 3 and 7 to proceed. The Commission can require compliance with conditions in its orders before allowing construction to begin.<sup>77</sup> And, as noted above, section 19(c) on its face contemplates the Commission’s issuance of stays of its orders.<sup>78</sup>

42. Kinder Morgan misconstrues the effect of the Commission’s pronouncement in Order No. 871. As we explained above, even prior to the rule’s enactment, it is rarely the case that construction can begin immediately upon issuance of an order authorizing new

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<sup>76</sup> 896 F.3d at 631.

<sup>77</sup> The Commission has broad authority to condition certificates for interstate pipelines on “such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. 717f(e); *see also, e.g., ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (noting the Commission’s “extremely broad” conditioning authority).

<sup>78</sup> Even if Order No. 871 were construed to be a blanket stay, such an action would be supported by the Commission’s articulated desire to balance its commitment to expeditiously responding to parties’ concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of agency review.

natural gas facilities under NGA section 3 or 7.<sup>79</sup> The authorization or certificate holder must first file documentation demonstrating that it has received all applicable authorizations required under federal law or that such authorizations have been waived, and that it has satisfied all preconstruction requirements. Accordingly, we do not anticipate the time period during which authorization to begin construction may not be permitted—i.e., during 30-day rehearing period and, if a qualifying rehearing request is filed, until that request is no longer pending before the Commission, the record of the proceeding is filed with the court of appeals, or 90 days has elapsed since the rehearing request was deemed denied by operation of law—to be unduly long or a significant departure from the Commission’s prior practice.

**C. Commission Policy on Exercise of Eminent Domain Pending Rehearing**

43. In Order No. 871-A, in addition to the issues raised on rehearing, we also sought comment on whether, and if so, how, the Commission should modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are pending before the Commission.<sup>80</sup> As further discussed below, in light of the balance of interests at stake, we will adopt a policy of presumptively staying an NGA section 7(c) certificate order during the 30-day period for seeking rehearing, and pending Commission resolution of any timely requests for rehearing filed by a landowner, until the earlier of the date on which the Commission (1) issues a substantive order on rehearing or otherwise indicates that the Commission will not take further action, or (2) 90 days following the date that a request for rehearing may be deemed to have been

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<sup>79</sup> See *supra* P 37.

<sup>80</sup> Order No. 871-A, 174 FERC ¶ 61,050 at P 7.

denied under NGA section 19(a). This policy will *not* apply where the pipeline developer has already, at the time of the certificate order, acquired all necessary property interests or where no landowner protested the section 7 application. In addition, where no landowner files a timely request for rehearing of the certificate order, the stay will automatically lift following the close of the 30-day period for seeking rehearing.

44. As explained in Order No. 871,<sup>81</sup> when the Commission grants a certificate of public convenience and necessity, NGA section 7(h) authorizes the certificate holder to exercise eminent domain authority if it “cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain” the authorized facilities.<sup>82</sup> This statutory framework permits pipeline developers, absent a Commission- or court-ordered stay, to start the process of condemning an individual’s land before the Commission completes the certificate proceeding, including consideration of the merits of any timely filed requests for rehearing.<sup>83</sup> While natural gas industry commenters note that developers make efforts to avoid the use of eminent domain,<sup>84</sup> landowners describe “having to face the trauma,

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<sup>81</sup> Order No. 871, 171 FERC ¶ 61,201 at P 4.

<sup>82</sup> 15 U.S.C. 717f(h). The NGA specifies that any such condemnation proceedings shall take place in the federal court for the district in which the property is located or in the relevant state court.

<sup>83</sup> See *Allegheny Def. Project v. FERC*, 932 F.3d 940, 948, 950, 952-53, 956 (D.C. Cir. 2019) (Millet, J., concurring) (detailing the harm to landowners’ constitutionally protected property interest in their homes as “a private interest of historic and continuing importance”) (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993)).

<sup>84</sup> INGAA Initial Brief at 22.

expense, and permanent consequences of condemnation suits that begin on the heels of a Commission Certificate Order.”<sup>85</sup>

45. The courts, however, have held that the issuance of a valid certificate is all that is required from the Commission for a pipeline developer to begin eminent domain proceedings when it cannot otherwise acquire the property covered by the certificate.<sup>86</sup> In other words, the Commission lacks the authority to deny or restrict the power of eminent domain in a section 7 certificate.<sup>87</sup> Nor does the Commission have the authority to oversee the acquisition of property rights through eminent domain, including issues regarding the timing of and just compensation for the acquisition of property rights,<sup>88</sup> which are matters reserved for the courts.<sup>89</sup>

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<sup>85</sup> Niskanen Center Reply Brief at 10, 16 (noting a 2017 press report of 300 condemnation actions commenced in Virginia by the developers of the Mountain Valley Pipeline) (citing The Roanoke Times, *Mountain Valley sues landowners to gain pipeline easements*, (Oct. 27, 2017), [https://roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-through-eminent/article\\_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html](https://roanoke.com/business/news/mountain-valley-sues-landowners-to-gain-pipeline-easements-through-eminent/article_abff5d87-1aee-5a50-b3c2-b3ee0c812e44.html)); *see also id.* at 9 (stating that the burden on landowners from allowing eminent domain proceedings to commence upon issuance of a certificate continues after *Allegheny*); Landowners Initial Brief at 1-3, 5 (explaining that the commenters had faced three different iterations of a proposed projects over 15 years in Oregon, and urging the Commission to disallow the use of eminent domain pending Commission certificate proceedings, including on rehearing).

<sup>86</sup> *Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, 265 (3d Cir. 2018) (stating that NGA section 7(h) “contains no condition precedent” to the right of eminent domain other than issuance of the certificate when a certificate holder is unable to acquire a right-of-way by contract); *Berkley*, 896 F.3d at 628 (“Issuing such a Certificate conveys and automatically transfers the power of eminent domain to the Certificate holder . . . . Thus, FERC does not have discretion to withhold eminent domain once it grants a Certificate.” (citation omitted)).

<sup>87</sup> *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (“The Commission does not have the discretion to deny a certificate holder the power of eminent domain.” (citation omitted)).

<sup>88</sup> *PennEast Pipeline Co., LLC*, 174 FERC ¶ 61,056, at P 10 (2021).

<sup>89</sup> *Id.* (citing *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018));

46. On the other hand, the Commission unquestionably may determine the effective date of<sup>90</sup> and stay its own orders,<sup>91</sup> and courts have specifically contemplated that a stay would be operative to withhold the eminent domain authority otherwise afforded by NGA section 7(h).<sup>92</sup> The Commission also has the “power to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act.”<sup>93</sup> Accordingly, in light of the balance of interests identified in the record, the Commission will, in future

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*Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018); *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 at P 33 n.82 (2018)).

<sup>90</sup> See 15 U.S.C. 717o (“Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe.”).

<sup>91</sup> Under the APA, an agency may issue a stay of its order where the “agency finds that justice so requires.” 5 U.S.C. 705. In determining whether this standard has been met, we consider several factors, including: (1) whether a stay is necessary to prevent irreparable injury; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest. See, e.g., *Millennium Pipeline Co., LLC*, 141 FERC ¶ 61,022, at P 13 (2012); *Ruby Pipeline, LLC*, 134 FERC ¶ 61,103, at P 17 (2011).

<sup>92</sup> See, e.g., *Allegheny*, 964 F.3d at 8 (citing *Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, 907 F.3d 725, 740 (3d Cir. 2018) (affirming district court action allowing condemnation action to proceed absent a Commission-ordered stay)); see also *Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate & Maintain a 42-inch Gas Transmission Line*, No. 2:17-CV-04214, 2018 WL 1004745, at \*5 (S.D.W. Va. Feb. 21, 2018) (“The landowners insist that the various challenges that Mountain Valley faces before FERC and the courts of appeals counsel against the granting of partial summary judgment. As explained earlier, a FERC order remains in effect unless FERC or a court of appeals issues a stay and no such stay has been issued here.” (internal citations omitted)); *In re Algonquin Nat. Gas Pipeline Eminent Domain Cases*, No. 15-CV-5076, 2015 WL 10793423, at \*7 (S.D.N.Y. Sept. 18, 2015) (“Here, various interested parties have filed Requests for Rehearing with FERC but, absent a stay by FERC, those Requests for Rehearing neither prohibit these proceedings from going forward nor affect Algonquin’s substantive right to condemn or the need for immediate possession.”); *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence Cty. of State of R.I.*, 749 F. Supp. 427, 431 (D.R.I. 1990) (“Because in this case the Commission’s order has not been stayed, condemnation pursuant to that order may proceed.”).

<sup>93</sup> 15 U.S.C. 717o.



proceedings,<sup>94</sup> adopt a policy of presumptively staying an NGA section 7(c) certificate order<sup>95</sup> during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners, up until 90 days following the date that a request for rehearing may be deemed to have been denied under NGA section 19(a). We think 90 days is appropriate because it balances the competing interests at stake including the project developer's interest in proceeding with construction when it has obtained all necessary permits, and a project opponent's interest in being able to challenge the Commission's ultimate decision before irreparable harm may occur. This policy will *not* apply where the pipeline developer has already, at the time of the certificate order, acquired all necessary property interests or where no landowner protested the section 7 application. In addition, where no landowner files a timely request for rehearing of the certificate order, the stay will automatically lift following the close of the 30-day period for seeking rehearing. This new policy is intended to indicate our belief that, as Judge Griffith put it in his concurrence in *Allegheny*, during the rehearing period "a district court . . . should not plow ahead" with condemnation, instead "holding an eminent-domain action in abeyance until the Commission completes its reconsideration of the underlying certificate order."<sup>96</sup>

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<sup>94</sup> Specifically, in NGA section 7(c) certificate orders issued after the effective date of this order.

<sup>95</sup> Unlike section 7 of the NGA, section 3 does not convey eminent domain authority, *see* Order No. 871, 171 FERC ¶ 61,201 at P 5, and, therefore, section 3 authorizations will not be subject to this policy.

<sup>96</sup> *Allegheny*, 964 F.3d at 22 (Griffith, J., concurring); *see also id.* (noting Judge Katsas's suggestion "that once the Commission grants rehearing of a certificate order, that order should be regarded as nonfinal . . . and a nonfinal order is presumably an invalid basis for transferring property by eminent domain" and suggesting "[t]hat suggestion merits a closer look") (citations omitted).

47. Given the grave consequences that eminent domain has for landowners, we believe that it is fundamentally unfair for a pipeline developer to use a section 7 certificate to begin the exercise of eminent domain before the Commission has completed its review of the underlying certificate order, through consideration of the merits of any timely filed requests for rehearing, either by issuance of an order on rehearing or a notice indicating that the Commission will not take further action. As the *en banc* D.C. Circuit recognized in *Allegheny*, reforming the Commission’s rehearing practice—alone—does not prevent the harm to landowners that can arise when developers initiating eminent domain proceedings upon issuance of a certificate order, without awaiting the completion of the Commission’s certificate proceeding.<sup>97</sup> There is no question that eminent domain is among the most significant actions that a government may take with regard to an individual’s private property.<sup>98</sup> And the harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation.<sup>99</sup>

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<sup>97</sup> *Allegheny*, 964 F.3d at 10 n.2; *see also id.* at 22 (Griffith, J., concurring) (“Those proceedings are the final piece of the puzzle.”); Niskanen Center Initial Brief at 8-11 (describing the burden on landowners from eminent domain as continuing after *Allegheny*).

<sup>98</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (observing that government action that provides for “public access [to private property] would deprive [the owner] of the right to exclude others, ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (“[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause.”); *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (“In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government.” (emphasis in the original)).

<sup>99</sup> *See United Church of the Med. Ctr. v. Med. Ctr. Comm’n*, 689 F.2d 693, 701 (7th Cir. 1982) (“It is settled beyond the need for citation . . . that a given piece of

48. Nevertheless, many, if not all, of the briefs filed by representatives of the natural gas industry were strongly opposed to the Commission’s consideration of changes in policy or practice regarding a pipeline developer’s exercise of eminent domain, including the general policy we adopt today. They described a range of consequences that would flow from such a decision, such as delayed project timelines, increased regulatory uncertainty, interference with the orderly development of natural gas, higher likelihood of project terminations, and purported environmental harm caused by producers flaring extra gas.<sup>100</sup>

49. We have thoroughly reviewed those comments and we recognize the industry’s concerns. We believe this order appropriately balances those concerns with the benefits that come from addressing the significant fairness and due process concerns that arise when a pipeline developer can begin the process of condemning private land before the Commission has completed its certificate proceeding, and the owners of that land can go to court to challenge the Commission’s ultimate decision, following rehearing, regarding the certificate that is the basis for that condemnation action.<sup>101</sup> Further, as described

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property is considered to be unique, and its loss is always an irreparable injury.”).

<sup>100</sup> See, e.g., INGAA Initial Brief at 18-27; Kinder Morgan Initial Brief at 7-9; Tallgrass Initial Brief at 9; see also Enbridge Reply Brief at 19; INGAA Reply Brief at 17.

<sup>101</sup> Contrary to the dissent’s arguments, we recognize that this new policy is a departure from our past practice. But the dissent errs in suggesting that this departure is unexplained. *Limiting Authorization to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098 (2021) (Danly, Comm’r, dissenting at P 12) (Order No. 871-B). As discussed throughout today’s order, including in the text accompanying this footnote, we believe that this new policy better balances the relevant considerations—such as fairness, due process, and developer certainty—thereby justifying the change in policy. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is

above, the presumptive stay reflects important limits designed to balance the interests of developers and landowners in light of the Commission's finding, in any given certificate order, that the proposed project is consistent with the public interest. At most, any stay will last no longer than approximately 150 days following the issuance of a certificate order.<sup>102</sup> Moreover, a pipeline developer may avoid a stay entirely by obtaining all necessary property interests prior to issuance of the certificate, a stay will only extend beyond the initial 30-day period for seeking rehearing where a landowner files a request for rehearing of the certificate order, and during the period in which a stay is in place and as permitted consistent with the stay of the certificate, the project developer can continue to engage in development related activities that do not require use of landowner property or that are voluntarily agreed to by the landowner.

50. In addition, as noted above, particularly post-*Allegheny*, the Commission has significantly increased the speed with which it resolves rehearing requests, whether by addressing the merits of rehearing requests as expeditiously as possible or by issuing a notice within 30 days providing that rehearing may be deemed denied by operation of law, without also indicating the Commission's intent to take further action. We believe that the Commission's post-*Allegheny* practice should significantly reduce any burden on pipeline developers. In any case, we find that any burden imposed on pipeline developers

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permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.”).

<sup>102</sup> Approximately 150 days is the sum of the initial 30-day period for seeking rehearing, the next 30-day period before rehearing may be deemed denied by operation of law, and a final 90-day period, following the deemed denial.

by this new policy will be relatively minor and ultimately outweighed by the significant benefits it affords to landowners.

51. Finally, we reiterate that this new policy is only presumptive and that the question of whether to impose a stay will be decided on the circumstances presented in each particular certificate proceeding.<sup>103</sup> A pipeline developer may move to preclude, or lift, a stay based on a showing of significant hardship,<sup>104</sup> and the Commission may, in its discretion, grant such a motion upon finding that it is necessary or appropriate to commence condemnation proceedings prior to Commission action on rehearing or the date that is 90 days following the date that a request for rehearing may be deemed to have been denied under NGA section 19(a). Although, as noted, we will evaluate any motion on the specific facts and circumstances presented therein, we note that a commitment by the pipeline developer not to begin eminent domain proceedings until the Commission issues a final order on any landowner rehearing requests will weigh in favor of granting such a motion.

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<sup>103</sup> Contrary to the dissent's arguments, Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting at PP 6-12), we are announcing only a general policy with respect to stays. We will make a particularized application of that policy in individual certificate orders, applying the criteria for granting a stay on a case-by-case basis. Parties to those individual proceedings will have the opportunity to challenge the Commission's determination on whether to issue a stay in those proceedings.

<sup>104</sup> *See, e.g.*, INGAA Initial Brief at 20-21 (noting that state-law mechanisms allowing pipeline developers to obtain physical access to the pipeline route to conduct environmental and other information gathering surveys, often necessary for other federal and state permits, vary from state to state, with some states authorizing physical access "only by a party that otherwise has the power of eminent domain").

### **III. Regulatory Requirements**

#### **A. Information Collection Statement**

52. The Paperwork Reduction Act<sup>105</sup> requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (i.e., reporting, recordkeeping, or public disclosure requirements) directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in final rules published in the *Federal Register*.<sup>106</sup> The rule promulgated by Order No. 871, and revised herein, does not contain any information collection requirements. The Commission is therefore not required to submit to OMB for review this order addressing arguments raised on rehearing and clarification, and setting aside, in part, prior order.

#### **B. Environmental Analysis**

53. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant effect on the human environment.<sup>107</sup> The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment, including the promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.<sup>108</sup> Because the rule promulgated by Order No. 871, and revised herein, is procedural in

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<sup>105</sup> 44 U.S.C. 3501-3521.

<sup>106</sup> See 5 CFR pt. 1320.

<sup>107</sup> *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 52 FR 47897, 41 FERC ¶ 61,284 (1987).

<sup>108</sup> 18 CFR 380.4(a)(2)(ii).

nature, preparation of an Environmental Assessment or an Environmental Impact Statement is not required.

**C. Regulatory Flexibility Act**

54. The Regulatory Flexibility Act of 1980 (RFA)<sup>109</sup> generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The Commission determined that Order No. 871 was exempt from the requirements of the RFA.<sup>110</sup> This order addressing arguments raised on rehearing and clarification, and setting aside, in part, prior order does not disturb the Commission's finding.

**D. Document Availability**

55. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

56. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this

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<sup>109</sup> 5 U.S.C. 601-612.

<sup>110</sup> Order No. 871, 171 FERC ¶ 61,201 at P 16.

document in eLibrary, type the docket number excluding the last three digits in the docket number field.

57. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

**E. Effective Date**

58. This rule addressing arguments raised on rehearing and clarification, and setting aside, in part, prior order is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

List of Subjects in 18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements

By the Commission. Commissioner Chatterjee is not participating.  
Commissioner Danly is dissenting with a separate statement attached.  
Commissioner Christie is concurring with a separate statement attached.

ISSUED: May 4, 2021

Kimberly D. Bose,  
Secretary.



In consideration of the foregoing, the Commission is amending part 157, chapter I, title 18, *Code of Federal Regulations*, as follows:

**PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT**

1. The authority citation for Part 157 continues to read as follows:

**Authority:** 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352.

2. Amend § 157.23 by revising paragraph (b) to read as follows:

**§ 157.23 Authorizations to Proceed with Construction Activities.**

\* \* \* \* \*

(b) If a timely request for rehearing raising issues reflecting opposition to project construction, operation, or need is filed, until:

- (1) The request is no longer pending before the Commission;
- (2) The record of the proceeding is filed with the court of appeals; or
- (3) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 15 U.S.C. 717r(a).

**The following will not appear in the Code of Federal Regulations**

DEPARTMENT OF ENERGY  
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction  
Activities Pending Rehearing

DANLY, Commissioner, *dissenting*:

1. I dissent in full from today's order modifying and expanding Order No. 871.<sup>1</sup> As an initial matter, I write to state that I would grant rehearing on all matters and repeal the rule.

2. The Commission promulgated Order No. 871 on June 9, 2020, in advance of the decision in *Allegheny Defense Project v. FERC*,<sup>2</sup> the en banc proceeding before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that addressed longstanding objections to the Commission's practice of relying upon tolling orders to delay answering requests for rehearing.<sup>3</sup> In recognition of the injustice of the Commission's practice of tolling rehearing requests indefinitely, and that practice's consequent denial of an opportunity for litigants to perfect their appeals, the Commission issued Order No. 871 in an attempt to balance the interests of potential appellants with those of pipelines by delaying the issuance of notices to proceed with construction.<sup>4</sup> On June 30, 2020, the D.C. Circuit issued its en banc opinion in *Allegheny* in which it found that the Commission was prohibited from indefinitely tolling requests for rehearing and finding that parties were entitled to petition for review once a rehearing request had been denied by operation of law.<sup>5</sup> The D.C. Circuit, having rightly imposed the discipline the Commission was unwilling or unable to impose upon itself, obviated the pressing need animating the Commission's decision to delay the issuance of notices to proceed. In light of the D.C. Circuit's re-enforcement of the statutory scheme governing rehearing and appeal, the Commission today need not go any further than has the court. Nor do I see any real risk that a pipeline will commence construction before a party has the opportunity to petition for review. As the Commission itself states, "on average, natural

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<sup>1</sup> See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 FR 40,113 (July 6, 2020), 171 FERC ¶ 61,201 (2020) (Order No. 871).

<sup>2</sup> 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

<sup>3</sup> See Order No. 871, 171 FERC ¶ 61,201 (Glick, Comm'r, concurring in part and dissenting in part at P 1) ("It is readily apparent that today's final rule attempts to address *some* of the concerns raised in the *Allegheny Defense Project v. FERC* proceeding before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).").

<sup>4</sup> See *id.* P 11.

<sup>5</sup> See *Allegheny*, 964 F.3d at 18-19.

gas companies should not have expected to receive authorization to proceed with construction sooner than three months after order issuance.”<sup>6</sup> Accordingly, I see no reason why this rule—promulgated in the face of litigation and in light of legitimate, unresolved concerns for the competing rights of the parties before the Commission—is still required by law or prudence. I would repeal it in full and instead rely wholly upon the rehearing and appeal provisions ordained by Congress to balance our litigants’ various interests.

3. I also write separately in order to highlight a handful of self-evident legal infirmities that might form the basis of an aggrieved party’s appeal. With this order, the Commission has, for the third time in as many months, dramatically increased the uncertainty faced by the natural gas industry by changing its policies so as to make it harder to rationally deploy capital, accurately assess risk, or predict Commission action.<sup>7</sup> Worse yet, the Commission fails in this order to satisfy its obligations under the Administrative Procedure Act (APA) and implements policies that conflict with the plain text of the Natural Gas Act (NGA), the most obvious of which is our new, unnecessary, and unjustifiable presumption to stay certificate orders.

#### **I. The Commission fails to respond to arguments raised in briefing**

4. Turning first to the most basic of APA violations, the Commission declines to even acknowledge, let alone respond to, the arguments raised by the Interstate Natural Gas Association of America (INGAA) that the issuance of Order No. 871-A was improper.<sup>8</sup> INGAA argues:

(1) Order No. 871 was promulgated in violation of the notice-and-comment requirements of the Administrative Procedure Act, and that procedural deficiency cannot be cured by Order No. 871-A or other after-the-fact processes; (2) Order No. 871-A appears to invite comments on issues that were not raised in Order No. 871 or in the requests for rehearing of that Order, while ignoring other issues that were raised in requests for rehearing of that Order; (3) Order No. 871-A does not address the merits of the requests for rehearing of Order No. 871 or modify Order No. 871 in any respect, and likewise fails to explain why the Commission views the existing record as insufficient to rule on the prior requests for rehearing; and (4) Order No. 871-A contemplates a schedule that effectively delays a Commission ruling on the merits of

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<sup>6</sup> *Limiting Authorization to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098, at P 37 (2021) (Order No. 871-B).

<sup>7</sup> See *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021) (Danly, Comm’r, dissenting at P 2) (*Northern*); *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly, Comm’r, dissenting at P 32) (*Algonquin*).

<sup>8</sup> See, e.g., INGAA February 16, 2021 Initial Brief at 7-8.

the requests for rehearing of Order No. 871 until *ten months* after they were submitted, which violates the text and spirit of the D.C. Circuit's recent en banc decision in *Allegheny Defense*.”<sup>9</sup>

5. I for one would be interested to hear the Commission's response.<sup>10</sup> Whether the Commission's refusal was intentional or a consequence of hasty action, the Commission's decision to ignore arguments properly raised runs contrary to the APA and stands as an obvious failure to engage in reasoned decision making.<sup>11</sup> In addition to the APA violation I describe above, there are a number of other legal infirmities that require attention.

## **II. The Commission's new policy presumptively staying NGA section 7(c) certificate orders is contrary to law**

6. The Commission's new policy establishing a presumptive stay in section 7(c) certificate proceedings is simply beyond the Commission's authority. The power of eminent domain is surely profound and formidable. I cannot fault my colleagues for the anxiety they have expressed over its wise and just exercise. However, the Commission, as a mere “creature of statute,” can only act pursuant to law by which Congress had delegated its authority.<sup>12</sup> Congress conferred the right to certificate holders to pursue

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<sup>9</sup> *Id.* (emphasis in original).

<sup>10</sup> See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-A, 86 FR 7643 (Feb. 1, 2021), 174 FERC ¶ 61,050 (2021) (Danly, Comm'r, dissenting) (Order No. 871-A).

<sup>11</sup> See *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding “that FERC did not engage in the reasoned decisionmaking required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and failed to square its decision with its past precedent”); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (“Unless the Commission answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.”) (citations omitted); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) (“The Commission's failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious.”).

<sup>12</sup> *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (“As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.”) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)); see *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

eminent domain in federal district court or state court,<sup>13</sup> having recognized that states “defeat[] the very objectives of the Natural Gas Act”<sup>14</sup> by conditioning or withholding the exercise of eminent domain. Congress has made that determination. It has codified it into law. The Commission, as an executive agency, is empowered only to implement Congressional mandate, not to second-guess Congressional wisdom.

7. It is true that while “the Commission lacks the authority to deny or restrict the power of eminent domain in a section 7 certificate,”<sup>15</sup> “the Commission unquestionably may . . . stay its own orders.”<sup>16</sup> The Commission, however, has no authority to presumptively stay section 7 certificate orders.

8. The Commission appears to rely on APA section 705 to issue its presumptive stay, but that section does not grant such power.<sup>17</sup> APA section 705, titled “Relief pending review,” provides “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, *pending judicial review*,”<sup>18</sup> meaning the stay must be tied to litigation.<sup>19</sup> The Commission’s presumptive stay is not even tied to an application for rehearing let alone any litigation. Further, given the lack of discussion on how the Commission will implement this new policy, the assumption that the mere existence of a “landowner protest” automatically means that a stay is required in the interest of justice is rather questionable. Will the Commission stay a certificate where there is a protest by a landowner with property interests that abut the proposed right-of-way but are not subject to condemnation? And the Commission’s policy applies to where there is a “landowner

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<sup>13</sup> See 15 U.S.C. § 717f(h).

<sup>14</sup> S. Rep. No. 80-429, at 3 (1947).

<sup>15</sup> Order No. 871-B, 175 FERC ¶ 61,098 at P 45. It should be recognized that the Commission again preemptively answers a question that it directly posed in the pending Notice of Inquiry (NOI) for which comments are due May 26, 2021: “Under the NGA, does the Commission have authority to condition a certificate holder’s exercise of eminent domain?” See Question B6 in *Certification of New Interstate Nat. Gas Facilities*, 174 FERC ¶ 61,125, at P 15 (2021). The Commission continues to lull people into believing that the answers to the questions appearing in the NOI have yet to be resolved.

<sup>16</sup> Order No. 871-B, 175 FERC ¶ 61,098 at P 46.

<sup>17</sup> See *id.* P 46 n.91 (citing 5 U.S.C. § 705). I am unaware of Commission precedent that relies on APA section 705 as authority to stay Commission orders (other than a handful of hydropower cases granting the stay of the commencement of construction deadline).

<sup>18</sup> 5 U.S.C. § 705 (emphasis added).

<sup>19</sup> See *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) (“Most significantly, the relevant equitable considerations are not free-floating but, rather, must be tied to the underlying litigation.”).

*protest.*” Will the Commission apply the stay where a landowner protested but did not intervene? What about in the case where the landowner joined a protest, but may not have active interests in the proceeding? Some commenters have suggested that NGA section 19(c) grants the Commission such power.<sup>20</sup> The Commission does not acknowledge or adopt these arguments. Even so, NGA section 19(c) does not grant the Commission the power to stay its orders *before* a rehearing application is even filed.<sup>21</sup> Section 19(c) sets forth the rule—that “[t]he filing of an application for rehearing under subsection (a) shall not . . . operate as a stay of the Commission’s order”—and the exception to that rule—“unless specifically ordered by the Commission.”<sup>22</sup> In order for the exception to apply, the general rule must first apply: that is, someone must have filed a request for rehearing. Further, the Commission’s new policy elevates the stay from being the exception to being the rule itself, assuming the legislative power to amend section 19(c) to read: an order is stayed unless specifically ordered by the Commission. Only Congress can amend a statute.

9. Let us also not forget that identical phrases in the same statute are normally given the same meaning.<sup>23</sup> NGA section 19(c) provides that “[t]he commencement of proceedings under subsection (b) of this section shall not, *unless specifically ordered* by the court, operate as a stay.”<sup>24</sup> Imagine a scenario in which, in the course of a one-off proceeding, a court of appeals announced that, going forward, it would begin presumptively staying an entire category of Commission orders *before* a petition is filed. Article III courts, of course, have their own procedures, traditions, and powers. Still, such reading of the statute is absurd.

10. Many are quick to turn to NGA section 16 when all else has failed. However, the Commission likewise cannot rely on NGA section 16 in support of a presumptive stay. Section 16 of the NGA does not represent an independent grant of authority: “[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.”<sup>25</sup> This does not create new

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<sup>20</sup> See Public Interest Organizations February 16, 2021 Brief at 13-14 (arguing the Commission has discretion under NGA section 19(c) to stay a certificate order); Niskanen Center, *et al.* March 3, 2021 Reply Brief at 4 (“[T]he NGA’s only mention of an agency stay is in Section 19(c) . . . . The NGA also does not constrain the Commission’s authority as to when it can ‘specifically order’ a stay . . . .”).

<sup>21</sup> See 15 U.S.C. § 717r(c).

<sup>22</sup> *Id.*

<sup>23</sup> *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) (“identical words and phrases within the same statute should normally be given the same meaning”) (citation omitted).

<sup>24</sup> 15 U.S.C. § 717r(c) (emphasis added).

<sup>25</sup> *Id.* § 717o.

powers under the NGA or supersede section 19(c), which sets forth the conditions for granting a stay. Moreover, like its counterpart in Federal Power Act section 309,<sup>26</sup> the use of NGA section 16 must be “consistent with the authority delegated to it by Congress.”<sup>27</sup>

11. I am aware of no other grant of authority that the majority may be relying upon in support of its new presumptive stay policy.<sup>28</sup> At its root, the Commission’s presumptive stay policy impermissibly does what the Commission says it cannot do: the stay is designed to restrict the use of eminent domain.<sup>29</sup> It impedes a certificate holder’s right to exercise eminent domain immediately upon the issuance of the certificate, while claiming to allow the pipeline to “continue to engage in development related activities that do not require use of landowner property or that are voluntarily agreed to by the landowner.”<sup>30</sup> It effectively permits the stay to be lifted so long as there is “a *commitment by the pipeline developer not to begin eminent domain proceedings* until the Commission issues a final order on any landowner rehearing requests.”<sup>31</sup> How a pipeline can conduct any activity authorized by a stayed certificate or why a pipeline would request to lift a stay other than to exercise eminent domain are questions that beg clarification.

12. Even if it were not *ultra vires*, the Commission’s interpretation results in unfair surprise. Since at least 1965, the Commission (and the Federal Power Commission) have placed the burden on movants for stays to show that they will be irreparably injured in the absence of a stay.<sup>32</sup> The Commission’s policy has been to “refrain from granting stays in

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<sup>26</sup> 16 U.S.C. § 825h.

<sup>27</sup> *Verso Corp. v. FERC*, 898 F.3d 1, 7 (D.C. Cir. 2018) (quoting *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016)); *see id.* at 10 (“Section 309 accordingly permits FERC to advance remedies not expressly provided by the FPA, *as long as they are consistent with the Act.*”) (emphasis added) (citing *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017) (citing *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 158 (D.C. Cir. 1967))).

<sup>28</sup> To the extent that the Commission believes that by “applying the criteria for granting a stay on a case-by-case basis” cures any legal infirmity, it is wrong. Order No. 871-B, 175 FERC ¶ 61,098 at P 51 n.103. It is illogical to have a presumption in advance of a rehearing request and is contrary to the plain text in the NGA.

<sup>29</sup> *See id.* P 45.

<sup>30</sup> *Id.* P 49.

<sup>31</sup> *Id.* P 51 (emphasis added).

<sup>32</sup> *See, e.g., Consol. Edison Co. of N.Y.*, 33 F.P.C. 965, at 969 (1965) (“Four tests have been prescribed by the Court of Appeals, each of which an applicant for stay must satisfy in order to justify the extraordinary relief represented by a stay of an administrative order.”) (citations omitted); *see also Midcontinent Indep. Sys. Operator*, 151 FERC ¶ 61,220, at P 27 (2015) (“Otter Tail has not met the burden to show that it will suffer irreparable injury without a stay and that a stay is in the public interest.”),

order to assure definitiveness and finality in Commission proceedings.”<sup>33</sup> Now after merely asking, “[s]hould the Commission modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are

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*vacated and remanded for reasons not applicable, Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018); *Bradwood Landing LLC*, 128 FERC ¶ 61,216, at P 10 (2009) (“We find that Oregon has not met its burden to demonstrate that it will suffer irreparable harm absent the granting of a stay.”); *Acadia Power Partners, LLC*, 108 FERC ¶ 61,076, at P 5 (2004) (“We will deny El Paso’s request for a stay, as we find that El Paso has failed to meet its burden of demonstrating that it will suffer irreparable harm absent a stay.”); *Se. Hydro-Power, Inc.*, 74 FERC ¶ 61,241, at 61,825 n.12 (1996) (“the burden is on the movant . . . to demonstrate why its request for a stay is justified”); *Constr. Work in Progress for Pub. Utils.*, 24 FERC ¶ 61,071, at 61,190 (1983) (“the burden is upon petitioners for such extraordinary action to show that significant harm will be incurred and that the equities favor granting the stay.”); *Exemption from the Licensing Requirements of Part I of the Fed. Power Act of Certain Categories of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts or Less*, 20 FERC ¶ 61,061, at 61,134 (1982) (“In the context of their request for a stay . . . the burden is upon the petitioners for such extraordinary action to show that significant harm will be incurred and that the equities favor granting the stay.”); *Cities Serv. Oil Co.*, 53 F.P.C. 8, at 8-9 (1975) (“The applicant for a stay has the burden of establishing, absent the grant of such relief, it would be irreparably harmed.”); *Columbia Gulf Transmission Co.*, 37 F.P.C. 310, at 310 (1967) (“It is settled that in order to establish a case for a grant of extraordinary relief in the nature of a stay the applicant has the burden of establishing that absent the grant of such relief it would be irreparably injured.”) (citation omitted).

<sup>33</sup> *SFPP, L.P.*, 166 FERC ¶ 61,211, at P 7 (2019) (“When considering requests for a stay of Commission action, the Commission’s general policy is to refrain from granting stays in order to assure definitiveness and finality in Commission proceedings.”); *see also Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012) (“Our general policy is to refrain from granting stays in order to assure definitiveness and finality in our proceedings.”) (citation omitted); *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 158 (2006) (“The Commission’s general policy is to refrain from granting stays of its orders, in order to assure definitiveness and finality in Commission proceedings.”) (citation omitted); *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001) (“The Commission’s general policy is to refrain from granting stays of its orders, in order to assure definitiveness and finality in Commission proceedings.”) (citations omitted); *Bos. Edison Co.*, 81 FERC ¶ 61,102, at 61,377 (1997) (“However, the Commission follows a general policy of denying motions for stay based on a need for finality in administrative proceedings.”); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,630-31 (1991) (“We follow, however, a general policy of denying motions for stays, based on the need for definitiveness and finality in administrative proceedings.”) (citations omitted); *Holyoke Water Co.*, 30 FERC ¶ 61,283, at 61,575 (1985) (“The Commission has followed a general policy of denying stays, unless a party has demonstrated that it will be irreparably injured in the absence of a stay.”) (citations omitted).



pending,”<sup>34</sup> in an order on rehearing where the issue of eminent domain was not raised, the Commission suddenly departs from its policy favoring finality and shifts the burden to the pipeline before a rehearing is even filed. The Commission never announced that it was considering a presumptive stay policy or under what authority. In fact, many commenters did not address the presumptive stay. Those harmed by this surprise issuance should consider that agencies are not given deference “when there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’”<sup>35</sup>

### **III. The Commission’s decision is bad policy**

13. On top of being unlawful, the presumptive stay is also bad policy. Contrary to the Commission’s claims, the presumptive stay does not strike the appropriate balance between pipelines and landowners.<sup>36</sup> There can be no “balance” when the Commission violates clear Congressional mandate and attempts to withhold a statutory right afforded to certificate holders, especially when applied to applications already pending before the Commission.<sup>37</sup>

14. Further, the Commission’s attempt to downplay the industry’s concerns (including delayed project timelines, increased regulatory uncertainty, and higher likelihood of project terminations) because “any stay will last *no longer* than approximately 150 days following the issuance of a certificate order”<sup>38</sup> is, to put it mildly, unconvincing. Requiring the passage of four months before a certificate can go into effect is significant, especially since the time required for processing applications has already dramatically increased.<sup>39</sup> “Many of the proposed projects before the Commission, *some pending for*

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<sup>34</sup> Order 871-A, 174 FERC ¶ 61,050 at P 7.

<sup>35</sup> *Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 155 (citation omitted); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (“And recall too that deference turns on whether an agency’s interpretation creates unfair surprise or upsets reliance interests.”).

<sup>36</sup> Order 871-B, 175 FERC ¶ 61,098 at P 49.

<sup>37</sup> *See* U.S. Senators Hoeven, Manchin, Barrasso, Tester, Capito, Sinema, Cassidy, Cornyn, Cramer, Crapo, Cruz, Daines, Hagerty, Hyde-Smith, Inhofe, Lankford, Marshall, Moran, Risch, Rounds, Sullivan, Tillis, Thune, Toomey, and Wicker, Letter, Docket No. PL18-1-000, at 1 (filed April 30, 2021) (“Delaying and moving the regulatory goalposts on projects filed in good faith is contrary to the otherwise equitable application of the Policy Statement that all stakeholders expect. At a minimum, these projects should not be subject to newly contemplated considerations that fall outside the scope of the current Policy Statement or go beyond the Commission’s statutory authority.”).

<sup>38</sup> Order 871-B, 175 FERC ¶ 61,098 at P 49.

<sup>39</sup> *See, e.g.,* Northern Natural Gas Company February 5, 2021 Motion for an Expedited Order for the Northern Lights 2021 Expansion Project under CP20-503 (requesting expedited action for application filed on July 31, 2020); Iroquois Gas

*more than a year*, are critical to addressing supply issues and strengthening our energy infrastructure.”<sup>40</sup> It is not inconceivable that those projects whose applications have been pending for more than a year ultimately will be canceled as a result of delay. By way of example, nearly two years ago, Dominion Energy Transmission, Inc. withdrew its application for a certificate for its Sweden Valley Project that it had filed seventeen months prior.

15. Finally, in yet another unexplained deviation from its past precedent, the Commission holds that, in the event the Commission were to grant rehearing for the purposes of requesting further briefing in order to substantively reconsider a ruling, “the original authorization would no longer be in effect and the provisions of Order No. 871 would no longer apply since there would be no final order pursuant to which a notice to proceed could be issued.”<sup>41</sup> The Commission provides no citation for this holding, the consequences of which are that granting rehearing for purposes of further consideration causes the original order to be vacated. Not only does the holding find no support in NGA section 19, but it is also contrary to the decades of Commission practice wherein the issuance of tolling orders for the purposes of further consideration did not vacate the original order.

16. Further, this holding will wreak havoc on the Commission’s administration of other provisions under the NGA and FPA. For example, if the Commission requests further briefing in response to a request for rehearing of an NGA section 4 or FPA section 205 order on a proposed rate change, what rate should be charged? Or if the Commission requests further briefing on a request for rehearing of a complex order regarding market design, what rules apply to an auction that occurs before the Commission rules on the rehearing request? Would a request for further briefing vacate a Commission order under NGA section 5 or FPA section 206 finding that a certain rate or tariff provision is not just and reasonable and reinstate the prior rate or tariff provision? Is it only orders issued pursuant to NGA section 7 that are vacated when the Commission requests further briefing and, if so, what is the statutory basis for such a distinction? The Commission appears not to have even considered these far-reaching consequences of its holding and provides no explanation as to how these and many other difficult issues should be dealt with.

#### **IV. Conclusion**

17. In the past three months, with barely any warning or process, the Commission has called every existing certificate into question in *Algonquin*, reversed years of significance analysis in *Northern*, and written the right to seek eminent domain upon receipt of a

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Transmission System, L.P. January 26, 2021 Request for Prompt Issuance of Certificate of Public Convenience and Necessity under CP20-48 (requesting expedited action for application filed on February 3, 2020).

<sup>40</sup> U.S. Senator Hoeven, *et al.*, Letter, Docket No. PL18-1-000, at 1 (filed April 30, 2021) (emphasis added).

<sup>41</sup> Order No. 871-B, 175 FERC ¶ 61,098 at P 27.

certificate out of the Natural Gas Act. As the Commission continues issuing such unlawful and ill-conceived orders, we will see further severe curtailment of investment in and construction of critical natural gas infrastructure which will inevitably drive up prices and gravely jeopardize reliability.

For these reasons, I respectfully dissent.

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James P. Danly  
Commissioner

DEPARTMENT OF ENERGY  
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction  
Activities Pending Rehearing

CHRISTIE, Commissioner, *concurring*:

1. I write separately to add the following.
2. Last year the Commission issued Order No. 871.<sup>1</sup> Just a few weeks later, the D.C. Circuit issued its ruling in *Allegheny*.<sup>2</sup>
3. The combination created deep uncertainty, as well as the threat under Order No. 871, that a certificated facility could have its notice to proceed with construction withheld potentially for an *unlimited* period of time while requests for rehearing remained pending before the Commission.
4. Today's order is necessary to address the present unsustainable situation. While it may not be perfect nor exactly how I alone would resolve the uncertainties and threats created by Order No. 871, it does represent an acceptable compromise, consistent with the applicable law.
5. Notably, it puts clear time limits—where there are none now under Order No. 871—on how long the Commission is required to withhold a notice to proceed with construction while the Commission considers a request for rehearing.
6. Second, it sets forth a *policy* for future cases—not mandatory, but subject to the facts and circumstances of each case—that a property owner opposing the involuntary use of eminent domain should be protected from a seizure of his or her property during a reasonable period of time while the Commission is still considering requests for rehearing; however, this period will also be subject to the same time limits as the withholding of the notice to proceed with construction.
7. Third, nothing in today's order will prevent the developer from continuing expeditiously with all development activities that do not involve construction or the use of eminent domain against unwilling property owners. Voluntary land acquisition is unaffected by this order.
8. I understand the desire of the dissent simply to repeal Order No. 871 with nothing more,<sup>3</sup> but that is not a realistic prospect; put bluntly, it is not going to happen. Rather

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<sup>1</sup> Order No. 871, 171 FERC ¶ 61,201(2020).

<sup>2</sup> *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

<sup>3</sup> Danly Dissent at PP 1-2.

than allow the current unsustainable *status quo* to continue, under present circumstances I believe this order represents a realistic path forward. If it is not administered fairly or does not bring the clarity and certainty needed, it can be revisited.

Accordingly, I respectfully concur.

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Mark C. Christie  
Commissioner

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